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Nos. 97-826, 97-829, 97-830, 97-831,
97-1075, 97-1087, 97-1099, 97-1141

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

AT&T CORP., *et al.*
Petitioners,

v.

IOWA UTILITIES BOARD, *et al.*,
Respondents.

AT&T CORP., *et al.*,
Petitioners,

v.

CALIFORNIA, *et al.*,
Respondents.

On Writs of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

BRIEF OF PETITIONERS AT&T *et al.* IN NO. 97-826

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QUESTIONS PRESENTED

The Telecommunications Act of 1996 was enacted to "shift monopoly [local telephone] markets to competition as quickly as possible." To that end, it adopts new federal requirements that allow new entrants to use essential facilities and services that are controlled by the incumbent local monopolists. This case concerns the authority of the Federal Communications Commission ("FCC") over these new requirements of the Communications Act, and the substantive validity of two regulations that the FCC has determined are crucial to opening local markets to competition. The questions presented are:

1. Whether, despite the explicit grants of authority to the FCC, the Eighth Circuit correctly held that the FCC has no "jurisdiction" either to enforce or to adopt regulations to implement myriad new federal requirements of the Communications Act, that the pricing and some non-pricing requirements of the Act are within the exclusive jurisdiction of state utility commissions to implement, and that the FCC's authority over the remaining non-pricing requirements is limited to adopting narrow interpretative rules?

2. Whether, despite the FCC's undisputed findings that the rule is essential to local competition and supported by the ordinary meaning of the terms of the Act, the Eighth Circuit lawfully invalidated the FCC regulation that allows new entrants to obtain and use existing combinations of network elements and that precludes incumbent monopolists from breaking those elements apart in order to impose additional costs and service outages on their competitors?

3. Whether, despite its acknowledgment that the rule is supported by the Act's terms, the Eighth Circuit lawfully invalidated the FCC's most-favored-nation rule on the basis of its "belief" that the FCC was wrong in holding that the rule would better foster negotiations and more effectively promote the Act's goals?

LIST OF PARTIES AND AFFILIATES

The parties to the proceedings in the Eighth Circuit are listed in the captions of the decisions below, see Petitioners' Appendix A, 1a-4a; Appendix D, 73a-79a, and in Appendix E of the Petitioners' Appendix.

Pursuant to Supreme Court Rule 29.6, petitioners state as follows:

ACC Corporation has no parent company. It has a subsidiary, ACC TelEnterprises, Ltd., which has issued stock to the public.

AT&T Corp. has no parent company. It has an equity interest in the following publicly traded companies:

LIN Television Corporation;
American Mobile Satellite Corporation;
PriCellular, Inc.;
Novell, Inc.;
Lanser Wireless Inc. (Canada); and
SmartTone Telecommunications Holdings Ltd. (Hong Kong).

AT&T owns an interest in the following non-publicly traded company, which has public debt outstanding:

AT&T Credit Holdings, Inc.

America's Carriers Telecommunications Association ("ACTA") is a national association with over 200 members, the core membership of which is comprised of small to mid-sized telecommunications carriers providing competitive long distance services on a regional and national basis. ACTA has not issued shares or debt securities to the public. ACTA does not have

any parent companies, subsidiaries or affiliates that have issued shares or debt securities to the public.

Competitive Telecommunications Association ("CompTel") is an industry association representing the nation's competitive telecommunications carriers, with over 200 members. CompTel has not issued securities to the public, and it does not have any publicly-owned parents, subsidiaries, or affiliates.

Excel Telecommunications, Inc. ("Excel") is a wholly owned subsidiary of Excel Telephone, Inc. which, in turn, is wholly owned by Excel Communications, Inc., a publicly traded company. Excel has no non-wholly owned subsidiaries.

General Communications, Inc. ("GCI") is a publicly traded corporation. GCI, Inc., a wholly owned subsidiary of GCI, is an issuer of publicly traded debt securities. MCI owns 19.3% of the equity of GCI and Kearns-Tribune, Corporation owns 0.9% of the equity of GCI.

Sprint Corporation has no parent companies. Its only nonwholly owned subsidiary is Central Telephone Company (which in turn has wholly owned subsidiaries).

Telecommunications Resellers Association ("TRA") is an incorporated trade association representing over 650 resale carriers and their underlying product and service providers. TRA has no parent companies or subsidiaries.

WorldCom, Inc. ("WorldCom"), a Georgia corporation, is organized for the purpose of engaging in telecommunications and related businesses. WorldCom common stock is traded on The Nasdaq National Market ("NASDAQ") under the symbol "WCOM," and its depositary shares also are traded on NASDAQ under the symbol "WCOMP." On January 29, 1998, WorldCom completed the acquisition by merger of Brooks

Fiber Properties, Inc. (former NASDAQ: BFPT). On January 31, 1998, WorldCom completed the acquisition by merger of CompuServe Corp. (former NASDAQ: CSRV), and its acquisition of ANS Communications, formerly a wholly-owned subsidiary of America Online Inc. (NYSE: AOL). On November 10, 1997, WorldCom announced a definitive agreement to merge with MCI Communications Corp., a publicly held corporation (NASDAQ: MCIC). The two companies expect the merger to close sometime in mid-1998. As of April 3, 1998, WorldCom has no parent companies, subsidiaries, or affiliates that issue shares or debt securities to the public.

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The initial opinion of the Eighth Circuit reviewing the FCC's *First Report* is reported at 120 F.3d 753 (Pet. App. 1a) and the opinion granting in part and denying in part the petitions for rehearing (Pet. App. 69a) is reported at 120 F.3d 820. The opinion of the Eighth Circuit reviewing the FCC's *Second Report* (Pet. App. 73a) is reported at 124 F.3d 934. The FCC's *First Report* and its *Second Report* in its local competition rulemaking are reported at 11 F.C.C.R. 15499 (1996) and 11 F.C.C.R. 19392 (1996) and reproduced at Pet. App. 131a-353a and the Joint Appendix (J.A. 13-223).

JURISDICTION

The Eighth Circuit's order granting in part and denying in part petitions for rehearing of its decision on the FCC's *First Report* was entered on October 14, 1997. The Eighth Circuit's decision on the FCC's *Second Report* was entered on August 22, 1997. AT&T Corp. filed its petition for a writ of certiorari on November 17, 1997. This Court granted the petitions and cross-petitions filed by AT&T and others on January 26, 1998. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are 47 U.S.C. §§ 151, 152, 154(i), 160, 201, 208, 251-261, 303(r) (Pet. App. 93a-130a), and § 271 (reproduced in the appendix to this brief).

STATEMENT OF THE CASE

This case arises under the provisions of Title II of the Communications Act (47 U.S.C. §§ 251-276) that were enacted in the landmark Telecommunications Act of 1996. Pub. L. No. 104-104, 110 Stat. 56 (1996). These new federal requirements are intended to promote competition in "all telecommunications

markets"[1] primarily by "shift[ing] monopoly [local telephone] markets to competition as quickly as possible."[2] 47 U.S.C. §§ 251-62. In this regard, the 1996 Act made one radical and fundamental change in state and federal authority over telecommunications: it invalidates the state law prohibitions on competing local intrastate services that alone had previously prevented the Federal Communications Commission ("FCC") and federal antitrust authorities from opening local markets to competition. *Id.* § 253. Correlatively, the Act establishes new mechanisms to allow the States to advance the policy of "universal service" that had provided the only legitimate reason for their earlier legal entry barriers. *Id.* § 254.

However, the questions in this case arise under other sections of the Act: the provisions of §§ 251 and 252 in which Congress took additional steps to assure that new local service providers could rapidly acquire the capabilities that they need to offer services in competition with the monopoly of an incumbent local exchange carrier ("LEC"). These provisions allow new entrants to obtain essential facilities that a LEC controls under rates, terms, and conditions that are nondiscriminatory and cost-based, and to use the facilities to provide the competing services that § 253 authorizes. To implement §§ 251 and 252, the FCC adopted rules that would do no more than enable new entrants to use a LEC's essential facilities at the same economic cost, and other terms and conditions, that the LEC itself enjoys.

In the decisions before the Court, the Eighth Circuit vacated a number of these rules. First, it held that the FCC lacks jurisdiction over the Act's pricing requirements that are the single most important determinant of whether local competition

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[1] Joint Explanatory Statement of the Comm. of Conference, H.R. Conf. Rep. No. 104-458 at 113 (1996), reprinted in 1996 U.S.C.C.A.N. 124, 124.

[2] H.R. Rep. No. 104-204, at 89 (1995), 1996 U.S.C.C.A.N. 10, 55.

can develop as well as over certain non-pricing requirements.

Second, in those areas where the Eighth Circuit upheld the FCC's jurisdiction, it vacated FCC rules that give effect to the Act's explicit requirements and that are essential to the creation of the competition that Congress intended. Foremost, the Eighth Circuit vacated the FCC rule that implemented the requirement of "nondiscriminatory access to network elements on an unbundled basis" by allowing new entrants to obtain network elements in the same combined forms that the LECs provide them to themselves. This decision has led LECs to insist on a right to rip out existing physical connections among elements, thereby preventing the only form of local exchange competition that is today feasible on a widespread basis. The Eighth Circuit also vacated a rule that merely requires LECs to provide all new entrants with elements on the same terms.

As explained in detail below, these holdings are contrary to the Act's terms, structure, and purposes. However, the Eighth Circuit's jurisdictional and nonjurisdictional holdings also rest on a pervasive misunderstanding of the regulatory background against which the 1996 Act was passed and of how this Act did and did not change the law. In particular, the Eighth Circuit has interpreted the 1996 Act amendments to the Communications Act to (1) deny the FCC the jurisdiction over local exchange facilities that it already had under the Act's other provisions and (2) permit the discrimination against providers of interstate or intrastate services that was prohibited under the prior FCC regulations and federal antitrust decrees that § 251(g) requires the FCC to enforce until it adopts "supersed[ing]" regulations.

1. Local Telephone Service And The FCC And State Regulation Of It Prior To The 1996 Act.

Local telephone service is provided through a network that contains seven types of facilities or "network elements" that are

connected to one another physically and (through software in central control facilities) logically. But at the most basic level, a local telephone network consists of telephone wires -- called "local loops" -- that are strung along telephone poles or buried beneath city streets in cables and that connect each home or business in the area to an "end office switch." That switch will, directly or through other switches, route a call over transport facilities and other wires to the party being called.

All the jurisdictional issues in this case can be addressed by focusing on one network element: the "local loop." Like all other facilities in local networks, a local loop can be used to place and receive either calls that begin and end in the same State ("intrastate services") or calls that begin and end in different States ("interstate services"). Under the original Communications Act of 1934, regulatory authority over local loops and other facilities was generally divided between States and the FCC depending on how the loop was being used. States generally exclusively regulated the facility when used to provide intrastate services and the FCC had exclusive regulatory jurisdiction when the loop was used to provide interstate services, which were defined to include any service or facility that cannot be severed into interstate and intrastate components for purposes of the FCC's regulation.

This jurisdictional division resulted from § 2 of the Communications Act and the limited scope of the provisions that then comprised Title II of this Act. While § 2(a) gives the FCC jurisdiction over interstate services, § 2(b) provides that "no provision of the Act shall be construed to apply or to give the [FCC] jurisdiction" over rates and other conditions of intrastate services, and Title II of the Act then applied only to the rates, terms, and conditions of the interstate services of communications common carriers. 47 U.S.C. §§ 201-208.

In *Louisiana Public Service Commission* v. *FCC*, 476 U.S.

355 (1986), the Court thus held that the FCC lacked the authority to prescribe depreciation charges that would bind States in setting rates for intrastate services. The Court held that no provision of the Act unambiguously gave the FCC authority to prescribe depreciation charges that apply to rates for intrastate services. *Id.* at 379. The Court further concluded that the FCC's authority over interstate services could not justify its order, for another provision of the Act (§ 221) separated LEC investment in local loops and other facilities between interstate and intrastate services and allowed States and the FCC to apply their own depreciation rates to the portion of the LEC investment allocated to its jurisdiction. *Id.* at 375.

By contrast, it was equally well-settled under § 2 and the original terms of Title II (and their statutory predecessors) that the FCC had jurisdiction over local loops and other local exchange facilities in two circumstances. The first is when LEC networks are used to provide the "exchange access" service of originating or terminating interstate long distance calls, which are interstate services over which the FCC exclusively regulates the rates, terms, and conditions. See, *e.g.*, *Smith* v. *Illinois Bell Tel. Co.*, 282 U.S. 133 (1930); *NARUC* v. *FCC*, 746 F.2d 1492 (D.C. Cir. 1984). More than 20% of the LECs' $100 billion in annual revenues are from interstate exchange access services, and 25% of the LECs' investment in local loops is today allocated to interstate services. 47 C.F.R. § 36.154(c).

Second, the FCC had exclusive jurisdiction over a local loop and associated switching and transport facilities when a customer obtained it as part of a "private line," "private network," or other service in which a customer essentially "leases" an entire loop for a flat monthly charge and in which the customer will use the loop and the associated facilities or services to place both interstate calls and intrastate calls. Because the "service" obtained by the customer inherently encompasses both interstate and intrastate uses and cannot be

separated into components, the entire service is classified as an "interstate" service over which the FCC regulated rates, terms, and conditions.[3] This same principle was also applied to uphold the FCC's jurisdiction to require LECs to unbundle competitively priced telephone sets and other "customer premises equipment" ("CPE") from their local loops and to provide standard interfaces on their loops that equally accommodate other vendors' CPE. See *infra*.

At the same time, because of § 2(b) of the Communications Act and the limitations on the original scope of Title II, the FCC then had no authority to preempt state law entry barriers and to authorize the customer of the dedicated loops, CPE, or other facilities to use them to offer intrastate services in competition with LECs. Thus, the FCC's CPE and private network regulations operated only to establish rates, terms, and conditions under which a customer could obtain the loop and other associated facilities for its own use -- except in any States that authorized competing intrastate local services.

But until shortly before the 1996 Act was passed, virtually no State had authorized this competition for intrastate services. As courts had found, network externalities and the enormous economies of scale that characterize some or all of the components of local telephone networks meant that it was a natural monopoly and that no firm could make the "prohibitive capital investment" required to duplicate them. *See United States* v. *Western Elec. Co.*, 673 F. Supp. 525, 538 (D.D.C. 1987). However, the States prohibited competing intrastate local services even for the customers and services for which it was commercially possible. The reason is that they concluded that selective competition would undermine the system of

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[3] *See, e.g.*, 47 C.F.R. § 36.154(a)(subcategory 1.2); *MTS and WATS Market Structure*, 4 F.C.C.R. 5660 (1989); *California* v. *FCC*, 567 F.2d 84 (D.C. Cir. 1977) (per curiam).

"universal service" in which certain LEC services were provided at rates that were far in excess of their costs in order to support allegedly below-cost rates for rural or other customers.

2. The FCC's Pre-1996 Efforts To Foster Competition.

LECs also historically used their monopolies over local exchange facilities to prevent competition in the provision of (1) the telephone sets, business telephone systems, and other customer premises equipment that can be plugged into local loops, (2) the long distance services that can, through highly complex interactions with LEC transmission and switching equipment, be competitively provided by multiple firms, and (3) any competing local services that were authorized. The LECs foreclosed this competition first by refusing to allow interconnection of competing firms' services or products and then, when interconnection was ordered, denying the new firms access at the same economic costs and other terms and conditions that the LECs' products and services enjoyed.

For example, the FCC initially sought to introduce competition into the provision of customer premises equipment by invalidating LEC prohibitions against a customer's interconnection and use of other firms' equipment. The LECs responded by imposing requirements that made it more expensive and complicated for customers to use a LEC's local network if they obtained CPE from a LEC competitor. These discriminatory interconnection requirements were found (over 13 years later) to have been a "sham" imposed solely to raise rivals' costs. *See Litton Sys., Inc.* v. *AT&T*, 700 F.2d 785, 794-802 (2d Cir. 1983). In 1975, the FCC prescribed interface standards for local loops that were intended to apply without discrimination to all customer premises equipment. *See id.* at 795-98. In 1980, the FCC ordered LECs to unbundle their customer premises equipment from their monopoly local services by stating separate prices for each and giving customers

the option of using another vendor's CPE. It further ordered LECs to provide their CPE at competitively set prices and free of state rate regulation which was thereby preempted.[4]

Although customer premises equipment was then said to be used for intrastate services 97% of the time, courts of appeals upheld each of these regulations against claims that they invaded the States' exclusive jurisdiction under § 2(b). The courts concluded that the equipment at issue and the local loops were used to provide interstate as well as intrastate services, and that there was no practical basis for the FCC to regulate only the interstate uses.[5] These holdings were cited with approval in *Louisiana* (*see* 476 U.S. at 375-76 n.4), and courts of appeals uniformly followed them after *Louisiana* was decided in 1986.[6] At the same time, as with the case of the FCC's regulations of dedicated loops and private network services, the FCC's CPE regulation did not -- and could not then -- preempt State law prohibitions against competing local exchange services, so these FCC regulations, too, only assured that a customer could interconnect non-LEC switching and other equipment for use with that customer's own telephone services.

Beginning in the 1970s, the FCC also sought to foster competition in the provision of interstate long distance services

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[4] *Second Computer Inquiry*, 77 F.C.C.2d 384, 388, 443-44 (1980), *aff'd CCIA* v. *FCC*, 693 F.2d 198 (D.C. Cir. 1982).

[5] *NCUC* v. *FCC*, 537 F.2d 787, 790 (4th Cir. 1976); *NCUC* v. *FCC*, 552 F.2d 1036 (4th Cir. 1977); *CCIA* v. *FCC*, 693 F.2d 198, 214-15 (D.C. Cir. 1982).

[6] *See, e.g.*, *PUC of Texas* v. *FCC*, 886 F.2d 1325, 1333-34 (D.C. Cir. 1989)(Silberman, J.); *California* v. *FCC*, 39 F.3d 919, 931-2 (9th Cir. 1994); *NARUC* v. *FCC*, 880 F.2d 422, 431 (D.C. Cir. 1989) (because it would be impracticable to have "two separate phone systems with one being used wholly intrastate, unbundled cost-based pricing for a piece of equipment at the federal level necessarily precludes any other result by the states.'") .

by imposing interconnection, unbundling, and resale duties on LECs and their long distance affiliates.[7] In the early 1990s, the FCC further sought to foster competition with the LECs' interstate exchange access services. It ordered LECs to unbundle their exchange access services by giving customers the choice of using some LEC network components and not others and stating separate prices for the different components. The FCC also ordered LECs to permit competing exchange access carriers to interconnect at specific points and to "co-locate" their facilities (either physically or "virtually") with those of the LEC at FCC-approved rates.[8] Under settled principles, new entrants would have had a right to use these same interconnection and co-location arrangements to provide intrastate exchange and exchange access services if they had been authorized under state law -- as they generally were not.

3. The Antitrust Decrees And Their Preemption Of State Regulation.

In 1974, the United States had filed a suit under the Sherman Act against the then-integrated Bell System. The suit charged that the Bell Operating Companies or "BOCs" (which collectively served 80% of the nation) had used their local monopolies to favor their then-affiliate AT&T and to impede competition in long distance and other markets.

The Justice Department presented detailed evidence that the

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[7] *See, e.g.*, *Specialized Common Carriers*, 29 F.C.C.2d 870 (1971); *Local Distribution Facilities*, 46 F.C.C.2d 413 (1974); *Resale and Shared Use*, 60 F.C.C.2d 261 (1976); *Private Line Interconnection*, 60 F.C.C.2d 939 (1976); *MTS and WATS Market Structure*, 81 F.C.C.2d 177 (1980); *Exchange Network Facilities for Interstate Access*, 90 F.C.C.2d 202 (1982).

[8] *See, e.g.*, *Expanded Interconnection*, 7 F.C.C.R. 7369 (1992), *rev'd in part*, *Bell Atlantic* v. *FCC*, 24 F.3d 1441 (D.C. Cir. 1994)(holding the FCC then had no statutory authority to order physical co-location).

BOCs had discriminated against Bell System competitors in pricing and providing the essential facilities that the BOCs controlled. For example, the Department claimed that the BOCs had engaged in "price squeezes" against long distance competitors by imposing charges for monopoly exchange access services that were in excess of the economic cost that they and the Bell System's long distance affiliate incurred in using the same local facilities. *See United States* v. *AT&T,* 524 F. Supp. 1336, 1355, 1357, 1364-1370 (D.D.C. 1981). The Department also introduced evidence that the local exchanges are so complex and dynamic, and so dependent on the subjective judgment of the employees that manage them, that neither existing forms of utility regulation nor after-the-fact antitrust remedies could prevent these abuses.

In 1982, the Bell System consented to a Decree (the "MFJ") that granted the structural relief that the United States had sought. It required that the BOCs transfer their long distance facilities and other competitive assets to AT&T and that the reconstituted BOCs then be (1) divested from AT&T, (2) precluded from providing either interstate or intrastate long distance services (or manufacturing equipment) so long as they had local monopolies and (3) required to provide exchange access to providers of interstate and intrastate services on an unbundled basis under nondiscriminatory terms and conditions at cost-based rates (the "equal access" requirement). *United States* v. *AT&T,* 552 F. Supp. 131, 226-34 (D.D.C. 1982), *aff'd sub. nom. Maryland* v. *United States*, 460 U.S. 1001 (1983). An antitrust decree that contained the same equal access requirements, but less stringent separation requirements, was also entered against the nation's next largest LEC, GTE. *United States* v. *GTE Corp.*, 603 F. Supp. 730, 737-46 (D.D.C. 1984).

Over 30 States had intervened and opposed entry of the MFJ on jurisdictional grounds. They asserted that because the MFJ's requirements applied not only to interstate services but also to

intrastate services and the facilities used to provide them, the MFJ encroached upon the States' exclusive jurisdiction over intrastate services under § 2(b) of the Communications Act and violated the state action exception to the antitrust laws of *Parker* v. *Brown*, 317 U.S. 341 (1943), and its progeny. These States thus claimed both that the MFJ's requirements could not be implemented without their prior approval and that they would also have the authority to undo its requirements by ordering the divested BOCs to behave inconsistently with the MFJ's requirements with respect to intrastate services. The district court rejected these claims because the MFJ's provisions would promote competition in interstate services that were outside state regulation as well as any intrastate services that used the same BOC facilities. *See United States* v. *AT&T*, 552 F. Supp. at 153-160. This Court summarily affirmed these holdings. *Maryland* v. *United States*, 460 U.S. 1001 (1983).

Under the antitrust decrees and *Parker* v. *Brown*, States continued to control whether other carriers would be permitted to compete in the provision of intrastate exchange, intrastate exchange access, or intrastate long distance services. 552 F. Supp. at 159 n.117. However, when such services were authorized, the decrees' equal access requirements governed the LECs' provision of exchange access to the new entrants and preempted any inconsistent state regulations unless the antitrust decrees' provisions were waived. The decrees' equal access requirements were further held to prohibit a LEC from pricing and provisioning essential facilities in a manner that favored itself over competitors who provide local switching services, public telephone services, or any other authorized intrastate or interstate telecommunications services. *United States* v. *Western Elec. Co.*, 846 F.2d 1422, 1427-29 (D.C. Cir. 1988); *id.* 583 F. Supp. 1257 (D.D.C. 1984).

Further, federal courts had to rule on the BOCs' many requests for authority to provide long distance services under

the MFJ's standards, and were required to determine the sufficiency of state and federal regulations to eliminate the BOCs' monopoly power or to prevent its use to impede competition in long distance services. *United States* v. *Western Elec. Co.*, 673 F. Supp. 525, 544-546, 567-579 (D.D.C. 1987), *aff'd on this ground*, 900 F.2d 283, 289-92, 300-01 (D.C. Cir. 1990) (per curiam). Courts gave substantial deference to the Department of Justice on these questions, but no deference to the FCC or state regulators. See *id.*, 900 F.2d at 297-98.

4. The 1996 Act And Its Local Competition Provisions.

In the 1996 Act, Congress enacted a comprehensive scheme designed to (1) develop competition in local exchange and exchange access services and (2) relieve the BOCs from long distance restrictions only after local competition developed.

The provision of the Act that radically changes state and federal authority over telecommunications is § 253. It expressly invalidates any state law, regulation, or order that "prohibits" or has the "effect" of prohibiting any person from providing any telecommunications services. Section 253 thus assures that any firms that have obtained facilities and services that can be used to provide exchange services will have the right to do so. Correlatively, § 254 addresses the states' only legitimate reasons for having previously prohibited competition in intrastate local services. It adopts a new system in which surcharges will be imposed on all providers of telecommunications services to fund the costs of providing universal service to rural or other customers. Similarly, Congress also protected the States' historic interest in regulating rates of intrastate exchange and toll services to assure that they are not excessive.[9]

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[9] No section of the Act deprives States of this authority, and by deciding (in the Conference Committee) to delete the language from the House and Senate (continued...)

The provisions that are directly at issue in this appeal are §§ 251 and 252, which require incumbent LECs to provide new entrants with additional facilities and capabilities needed to provide all or some of the services that LECs offer. In particular, they impose duties on all incumbent LECs (save those rural LECs who receive exemptions under § 251(f)) that are designed to allow new entrants to enter part of the local market in a limited way and to enter the entire market in one of two different ways.

The provision that allows limited immediate entry into part of the local telephone business is § 251(c)(4), which permits resale of LEC services. In particular, it allows new entrants to obtain the LECs' existing retail services at wholesale rates (computed by subtracting from the LECs' retail rates the costs that they avoid when services are provided only at wholesale), and then only to "resell" the LECs' own retail services in competition with them. Because § 251(c)(4) does not enable a new entrant to offer the "exchange access" services that represent over 20% of LECs' revenues, it only permits entry into part of the market.

Section 251 establishes two other modes of entry that allow new entrants to enter the entire local telephone market and to compete with the full range of services that LECs offer. Section 251(c)(2) allows a firm that has connected some individual customers to its own alternative local exchange facilities to interconnect with a LEC's network and exchange traffic with it. But because the time and expense of constructing redundant facilities is so great -- and its economics so uncertain -- it could not lead to broad based competition for years or decades.

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[9] (...continued)
bills that made §§ 251-262 an exception to § 2(b), Congress assured that the FCC could not preempt state authority to regulate the rates for local exchange services, intrastate exchange access services, and intrastate long distance services on the "ancillary" and "protective" jurisdiction theories endorsed in *The Shreveport Rate Case*, 234 U.S. 342 (1914).

Most pertinently for present purposes, § 251(c)(3) requires LECs to provide access at rates, terms, and conditions that are just, reasonable, nondiscriminatory, and cost-based to any or all of the seven separate "network elements" that constitute the LECs' monopoly exchanges.[10] By authorizing new entrants to obtain access to network elements at cost, Congress intended to eliminate the insurmountable cost advantages that LECs would otherwise have by allowing new entrants to share in whatever economies of scale inhere in particular LEC facilities.

While these duties are subject to the general enforcement provisions of the Communications Act, the 1996 Act also adopts provisions designed to assure their rapid implementation. In particular, § 251(d)(1) required the FCC to adopt regulations to implement the requirements of § 251 by August 8, 1996. Section 252 further establishes a procedure and strict time deadlines through which competing carriers may obtain the interconnection arrangements that are required by § 251. Most pertinently, if negotiation fails to resolve all issues, § 252 entitles a new entrant to arbitrate "open issues" before the pertinent state commission if it is willing to do so or before the FCC if the state commission is not, and requires a decision in the arbitration within nine months of the beginning of the negotiations. §§ 252(b)(1), (b)(4)(C), (e)(4) & (e)(5).

In arbitrating open issues, state utility commissions and the

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[10] The network consists of (1) a network interface device located at each customer's premises, (2) the local loop that connects the customer premises to a switch, (3) switches, (4) interoffice trunks ("transport facilities") that connect switches to one another, (5) operator and directory assistance systems that are connected to switches, (6) signaling systems that are connected to each switch, determine the most efficient path for each call to take and provide the necessary routing information to the switches, and (7) operations support systems that, among other things, direct those physical and logical connections among the foregoing elements that are required to establish and maintain telephone service for any customer.

FCC are required to ensure that their decisions "meet the requirements of § 251, including the regulations prescribed by the [FCC] pursuant to section 251." § 252(c)(1). When state commissions make determinations under this section, the Act provides that an aggrieved party may bring an action in an appropriate federal district court to determine whether the arbitrated agreement "meets the requirements of section 251 and this section [252]." § 252(e) (6).

Finally, the Act transfers jurisdiction to the FCC over provisions of the MFJ and GTE antitrust decrees. First, § 251(g) provides that the requirements of these decrees that the BOCs and GTE provide equal access to interstate and intrastate competitors on an unbundled basis and at cost-based rates are to be enforced as FCC regulations until the FCC adopts "supersed[ing]" regulations under § 251. Second, the 1996 Act also transferred to the FCC jurisdiction over the core of the MFJ's long distance and manufacturing restrictions on BOCs. Section 271 provides that the FCC cannot grant a BOC long distance authority in any State unless and until the FCC -- after giving "substantial weight" only to the Justice Department's evaluation (*see* § 271(d)(2)) -- "finds," among other things, that the BOC is offering access to unbundled network elements "in accordance with the [pricing and other] requirements of sections 251(c)(3) and 252(d)(1)" of the Act (§ 271(c)(2)(B)(ii)) and that the authorization is "consistent with the public interest." § 271(d)(3)(C).

5. The FCC's Local Competition Rules And The Decisions Under Review.

The FCC adopted rules to implement the local competition requirements of §§ 251 and 252 of the Act in two separate rulemaking orders that were issued on August 8, 1996. The LECs and a number of state utility commissions filed petitions for review of these orders, which were consolidated in the

Eighth Circuit. It initially stayed the FCC's "pricing" and so-called "pick and choose" regulations. Following briefing and argument, the Eighth Circuit vacated both sets of regulations and also a number of the FCC's other rules.

The Court held that the FCC lacked "jurisdiction" to adopt regulations to implement the pricing requirements of § 251(c) and § 252(d) that are critical to the statutory scheme, and it vacated FCC rules that, among other things, had prohibited States from establishing rates under methodologies that would foreclose competition through price squeezes. J.A. 147-171 (¶¶ 704-739). The Eighth Circuit also held that the FCC lacked jurisdiction over some of the Act's non-pricing requirements (*e.g.*, § 251(b)(3)'s duty of dialing parity). Because the Eighth Circuit believed that the FCC's authority over § 251 was limited to adopting rules that interpret the six subsections of § 251 that mention the FCC, the Eighth Circuit further vacated several of the FCC's nonpricing rules that did not interpret these terms. Pet. App. 46a, 50a-52a & 52a-53a.

The Eighth Circuit also invalidated two FCC rules that were adopted as interpretations of the Act's terms and found essential to the Act's implementation. Most critically, after initially upholding it and over the opposition of the state commissions, the Eighth Circuit, on rehearing, vacated the rule (47 C.F.R. § 51.315(b)) that provides that "an incumbent LEC shall not separate requested network elements" that LECs access in combined form. Pet. App. 71a. The Eighth Circuit also invalidated the FCC rule (§ 51.809(a)) that implements § 252(i) by allowing new entrants to obtain any facility or service under the same terms contained in any approved agreement -- without necessarily subscribing to the entire agreement.

Finally, four days before the petitions for certiorari were granted, the Eighth Circuit also issued a writ of mandamus that orders the FCC to defer to state pricing determinations when

ruling on a BOC's application for long distance authority under § 271 of the Act. Under this order, the FCC will be obligated to grant an application even when the FCC would independently conclude that BOCs are pricing essential facilities at artificially high levels that violate the requirements of §§ 251(c) and 252(d) and that also mean a BOC would defeat the "public interest" by engaging in a price squeeze against long-distance competitors. Although § 271 requires the FCC to deny applications in that circumstance and § 402(b)(6), (9) gives the D.C. Circuit exclusive jurisdiction over § 271 decisions, the Eighth Circuit ordered the FCC to defer to States to assure that its § 271 decisions do not have an "effect" on state pricing determinations under § 252. *Iowa Utils. Bd.* v. *FCC*, 135 F.3d 535, 543 (8th Cir. 1998), *petitions for certiorari pending*.

INTRODUCTION AND SUMMARY OF ARGUMENT

As amended by the 1996 Act, the Communications Act represents a comprehensive national scheme that both (1) protects the historic state interests that formerly led the States to prohibit or limit competition in intrastate local telephone services and (2) preempts all state law entry barriers and provides for the rapid implementation of new federal requirements to assure that new entrants may provide whatever forms of competing local telephone services are feasible.

The historic state interests are protected by two features of the Act that are not directly at issue in this case. Section 254 establishes a new mechanism that fully protects the States' historic policies of fostering "universal service" by creating a new system of explicit funding of any subsidized below-cost rates for rural and other customers. In particular, it requires the funding of universal service through "competitively neutral" surcharges on the revenues of all providers of telecommunications services, and § 254(f) permits individual States to increase those surcharges if they wish to fund greater

subsidies for specified customers. Section 254 thus eliminates the need for the prohibitions on competition which had been justified to assure that above-cost rates could be maintained for some services in order to fund the subsidies for other services.

At the same time, the Act protects the historic state interests of assuring that customers of intrastate services are not charged excessive rates. See p. 12, n.9, *supra*. Thus, while the local competition provisions of the Act allow new entrants to use their existing or newly-acquired service capabilities to offer intrastate exchange as well as interstate exchange access services, each state utility commission will maintain the ability to regulate all carriers' rates for all intrastate exchange, intrastate exchange access, and other intrastate services.

The revolutionary provision enacted by the 1996 Act is § 253, which preempts any state laws that prohibit or have the effect of prohibiting any firm from offering any intrastate or interstate telecommunications services. By itself, § 253 allows firms to use the capabilities that they acquired under earlier FCC regulations or antitrust consent decrees to offer intrastate exchange and exchange access services in any State, regardless of whether it is authorized by state law. Section 251(g) further gives the FCC jurisdiction over the equal access requirements of the MFJ and GTE antitrust decrees until such time as the FCC adopts "supersed[ing]" "regulations." Far more significantly, §§ 251 and 252 give new entrants additional access, interconnection, and resale rights and establish strict time tables and procedures designed rapidly to implement the new arrangements and to minimize entry costs for new entrants.

To apply the new federal requirements to local conditions, the Act allows for proceedings in 50 different States followed by federal district court actions. It is thus essential to the Act's goal of rapid implementation of the new federal requirements that there be federal regulations that define these requirements

in advance of the conclusion of the state proceedings and federal district court review. That is why § 251(d) requires the adoption of federal regulations to implement § 251's requirements within six months of the 1996 Act's enactment. Indeed, because state commission determinations are reviewable in federal courts which can give no deference to a state commission's interpretations of federal law, States will be reversed if they fail to follow the interpretation of the Act that best effectuates its terms and purposes. Thus, States have no legitimate interest in initially establishing prices and other terms of interconnection agreements on the basis of their own varying interpretations of federal requirements.

The decisions of the Eighth Circuit to vacate the FCC's critical rules wreak havoc on this carefully constructed scheme. The pricing and other rules that were vacated on jurisdictional grounds are within the FCC's explicit authority, and the rules that were vacated on the merits were compelled by the statute's terms, structure and purposes -- and were, in all events, reasonable. See *Chevron U.S.A., Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842-45 (1984).

First, the Eighth Circuit's decision to vacate all the FCC's pricing and a number of its non-pricing rules on jurisdictional grounds is erroneous. Sections 201, 303, and other provisions of the Act unambiguously give the FCC authority to adopt rules to "carry out" all "the provisions" of the Act, not merely those involving "interstate services" and the six subsections of § 251 that allude to the FCC. Thus, § 251(d) required the adoption of rules implementing § 251 by August, 1996. Further, even if the FCC's general rulemaking authority were limited to interstate services, the jurisdiction over interstate services encompasses the arrangements at issue here in which new entrants obtain local loops and other facilities on an unseparated basis in order to provide interstate as well as intrastate services. Finally, because the FCC's authority under the Act is not limited to

construing the terms of six subsections of § 251, the Eighth Circuit's erroneous jurisdictional ruling also led it to apply an erroneous legal standard in reviewing the rules that it found the FCC had jurisdiction to adopt.

Second, the Eighth Circuit erred in vacating the FCC rule that provides that, except upon request, "an incumbent LEC shall not separate requested network elements that the incumbent LEC currently combines." This rule is compelled by the terms of § 251(c)(3), for it requires LECs to provide "nondiscriminatory access to network elements [in the plural] on an unbundled basis at any technically feasible point [in the singular]." § 251(c)(3). By its terms, the only way this duty can be discharged is if a new entrant can obtain access to combinations of elements at a single point, and it further would be manifest discrimination -- and impermissibly to raise a rival's costs -- for the LEC to access elements in their combined form, but require new entrants to incur the delay and costs of combining elements that LECs separate solely to frustrate competitors. As dictionaries, prior regulatory decisions, and LECs' own prior arguments establish, the Eighth Circuit is simply wrong that providing elements on an "unbundled" basis requires a LEC artificially to disconnect them from one another, and the FCC's interpretation was, in all events, a reasonable one under *Chevron*.

Third, the Eighth Circuit similarly had no basis to vacate the so-called "pick and choose" rule. It implements § 252(i)'s requirement that any firm may obtain individual elements on the same terms set forth in another interconnection agreement -- without necessarily subscribing to the entire contract.

I. THE FCC HAS AUTHORITY TO ADOPT RULES IMPLEMENTING §§ 251 AND 252.

The Eighth Circuit invalidated the FCC's regulations

implementing the pricing and many of the non-pricing requirements of §§ 251 and 252 on the ground that the FCC lacks "jurisdiction" over all the provisions of those sections and that the FCC's rulemaking authority is here limited to construing the terms of the six subsections of § 251 that refer to the FCC. On this basis, the Eighth Circuit vacated the FCC regulations defining (1) the LECs' and the arbitrators' obligations in pricing interconnections, network elements, wholesale rates for resale, and co-location arrangements under §§ 251(c) and 252(d) of the Act; (2) the LECs' duty to provide "dialing parity" under § 251(b)(3); (3) the LECs' duty to file contracts with other LECs under § 252(a)(1); (4) the conditions in which rural LECs can be exempted from § 251's duties under § 251(f); and (5) the FCC's authority under § 208 to decide complaints that either challenge the terms on which a LEC provides interconnection or that seek to enforce the LEC's duty to comply with its interconnection agreements.[11] Subsequent to the decisions under review here, the Eighth Circuit also held that, despite the terms of § 271(d), the FCC must defer to state pricing determinations in ruling on BOC applications for long distance authority. *Supra*, pp. 16-17.

These jurisdictional holdings rest on three grounds. First, the Eighth Circuit concluded that the "plain language" of the Act establishes that the FCC has authority to implement and enforce only those provisions of the Act that govern "interstate services" or that specifically mention the FCC. Second, it concluded that §§ 251 and 252 govern intrastate and not interstate services, and that § 2(b) of the Act would require the Eighth Circuit's jurisdictional holding even if the Act's terms were ambiguous. Third, although §§ 10, 208, 271, and other

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[11] Because it believed that the FCC's authority over the rest of § 251 is limited to construing the terms of six subsections, the Eighth Circuit also vacated several rules (§§ 51.305(a), 311(c), 315(c)-(f) & 317) which were not adopted as interpretations of the Act's terms. *See* I.D, *infra*.

provisions of the Act both presume that the FCC has authority over all §§ 251's and 252's requirements and expressly grant the FCC the authority to interpret and apply these requirements in making other determinations, the Eighth Circuit held that these other provisions could and must be construed to deny this authority to the FCC in order to protect the States' jurisdiction.

Each of these three grounds is contrary to the unambiguous terms of the Act and its structure. Because §§ 251 and 252 unambiguously "apply" to the intrastate as well as the interstate aspects of the new arrangements and because the Act unambiguously "give[s]" the FCC "jurisdiction" over these provisions, the Eighth Circuit was also wrong in concluding that § 2(b)'s rule of construction supported its holdings.

A. Congress Vested the FCC With Regulatory Authority Over All Provisions of the Communications Act.

First, Congress unambiguously granted the FCC jurisdiction to adopt rules to implement all the requirements of §§ 251 and 252. It did so by expressly and deliberately codifying these and related provisions in Title II of the Communications Act (47 U.S.C. §§ 251-76). Congress thereby directed that these provisions would be enforced and administered in accordance with the Act's remedial and procedural provisions for which the FCC is responsible and accountable to Congress.[12]

Indeed, two separate provisions of the Communications Act expressly and unambiguously grant the FCC jurisdiction to

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[12] Congress' decision to include the terms of §§ 251 and 252 within the FCC's organic statute was deliberate. Whereas Congress directed that new §§ 251-261 be inserted in the U.S. Code as amendments to the Communications Act, *see* § 101(a), Pub. L. 104-104, 110 Stat. at 61, Congress specified that other provisions of the 1996 Act would be codified in other titles of the U.S. code. § 601(b)(3), 110 Stat. at 143, § 701(b)(1), 110 Stat. at 147-48.

"prescribe such rules and regulations as may be necessary . . . to carry out the provisions of this Act." 47 U.S.C. §§ 201(b); *accord*, § 303(r). In addition, other provisions of the Act authorize the FCC not only to "enforce and execute" all "the provisions of this Act" (*id.* § 151; *accord*, § 208), but also to "perform any and all acts, make such rules and regulations, and issue such orders, not inconsistent with this Act, as may be necessary in the execution of its functions." *Id.* § 154(i). This Court has thus held that the FCC has authority to adopt any rule that is not inconsistent with the Act's provisions and that reasonably implements them.[13]

Further, the local competition provisions themselves establish that Congress understood that the FCC has the authority to issue regulations implementing all the provisions of §§ 251-76. Section 251(d) requires that "[w]ithin six months after [the date of enactment of the Telecommunications Act of 1996], the [FCC] shall complete all actions necessary to establish regulations to implement the requirements of this section."

The only way the Eighth Circuit could reach its different conclusion was by ignoring, or distorting, the plain language of each of the foregoing provisions. For example, the Eighth Circuit held that § 201(b) grants rulemaking authority over only "interstate . . . services" because the substantive standard contained in the first sentence of § 201(b) applies only to interstate services. Pet. App. 12a. But § 201(b)'s last sentence grants the FCC rulemaking authority over all "the provisions of this Act," not merely over the substantive "provisions of this Section." Indeed, the Eighth Circuit's attempt to limit this grant to the prohibition contained in the first sentence of § 201(b) is particularly spurious, for the remaining four sentences of this

[13] *National Broad. Co.* v. *FCC*, 319 U.S. 190, 216-220 (1943); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 172-78 (1968); *FCC* v. *National Citizens Comm. For Broad.*, 436 U.S. 775, 793-94 (1978).

subsection all contain rules and prescriptions that, by their express terms, apply to the entire "Act." Further, there is even less substance to the Eighth Circuit's attempt to avoid § 303(r)'s independent and equally explicit grant of rulemaking authority.[14]

Similarly, the Eighth Circuit also had no grounds for dismissing § 251(d)'s requirement that the FCC adopt regulations implementing "the requirements of this section [251]" by August of 1996. Indeed, all the Eighth Circuit was able to say is that § 251(d)(1) "operates primarily as a time constraint" (Pet. App. 12a), which is an acknowledgment that it is at least "secondarily" a command that the FCC adopt rules implementing all § 251's requirements. That Congress *required* the FCC to adopt these rules is vivid confirmation that Congress understood and intended that the FCC would be *authorized* to adopt rules implementing all the Act's provisions.

Correlatively, there is no basis for the Eighth Circuit's conclusion that the FCC's rulemaking authority is limited to the six subsections of § 251 that mention the FCC: §§ 251(b)(2), (c)(4), (d)(2), (e), (h)(2) & (g). Four of these provisions mention the FCC to establish that its jurisdiction over a subject is exclusive and that States could not adopt supplemental "access and interconnection" regulations even if they were otherwise "consistent" with federal standards and did not

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[14] Section 303(r) states that the FCC may "[m]ake such rules and regulations and prescribe such restrictions and conditions, not inconsistent with law, as may be necessary to carry out the provisions of this Act." Yet the Eighth Circuit held that § 303(r) "merely suppl[ied] the FCC with ancillary authority to issue regulations that may be necessary to fulfill its primary directives contained elsewhere in the statute." 120 F.3d at 795. Moreover, while the FCC rules at issue here implement explicit statutory requirements, this Court has elsewhere rejected the Eighth Circuit's conclusion by holding that the rulemaking authority conferred by § 303(r) is not limited "to those activities and forms of communication that are specifically described by the Act's other provisions." *Southwestern Cable*, 392 U.S. at 172, 181.

"substantially prevent implementation of . . . the purposes of [§§ 251-61]." § 251(d)(3); *compare* §§ 251(b)(2), (c)(4), (e), & (h)(2). The fifth of these provisions, § 251(d)(2), merely imposes conditions on the FCC's rulemaking authority by requiring the FCC to consider certain factors in defining network elements. Indeed, the fallacy of the Eighth Circuit's jurisdictional holding is demonstrated by the fact that it treated § 251(d)(2) as a "grant" of authority, when all it is is a statutory provision that imposes conditions on rulemaking authority granted by the Act's other provisions.

The remaining provision that mentions the FCC -- § 251(g) -- confirms the FCC's jurisdiction over all the pricing and non-pricing requirements. Section 251(g) gives the FCC jurisdiction over the MFJ and GTE antitrust decrees' "equal access" requirements that fully applied to all authorized intrastate services (see pp. 9-12, *supra*) -- including expressly those relating to "receipt of compensation." Because § 251(g) further requires that the FCC enforce these requirements as FCC regulations "until such restrictions and obligations are explicitly superseded by regulations prescribed by the Commission," it confirms that the FCC's authority to adopt "supersed[ing]" regulations under § 251 encompasses its pricing as well as its non-pricing requirements.

Indeed, the Eighth Circuit could not follow its own jurisdictional holding. It reviewed on the merits or upheld a number of rules that were outside the FCC's jurisdiction under the terms of its own decision: *e.g.*, the FCC's rules implementing the requirements of § 252(i), and the provisions of § 251 governing negotiation (§ 251(c)(1)), interconnection (§ 251(c)(2)), the terms and conditions under which network elements must be made available (§ 251(c)(3)), and co-location (§ 251(c)(6)). Quite plainly, the foregoing rules did not interpret §§ 251(b)(2), (c)(4), (d)(2), (e), (h)(2) or (g).

Finally, the Eighth Circuit believed that there is an additional textual basis for its holding that the FCC has no authority to adopt pricing rules: that is, the fact that § 252(c)(2) of the Act directs the States to establish prices in accord with the standards of § 252(d) and that neither provision refers to FCC regulations. Pet. App. 10a-14a. The short answer to this claim is that §§ 151, 154, 201, and 303 give the FCC authority to adopt rules to execute, enforce, and carry out all the provisions of the Act, including the provisions of §§ 252(c)(2) and 252(d) that direct States to "establish" specific rates that satisfy particular federal standards: *e.g.*, that network element rates be "based on the cost" of "providing" them "determined without reference to a rate-of-return or other rate-based proceeding."

In this regard, this Court has elsewhere held that a statutory provision that is far less explicit than those in the Communications Act had authorized another federal agency (there HHS) to adopt rules that bind States in setting rates under a federal statute even when, as is not the case here, the state bodies were directed to establish rates "determined in accordance with methods and standards *developed by the State[s]*." *Wilder* v. *Virginia Hosp. Ass'n*, 496 U.S. 498, 502-03, 515-17 (1990) (quoting statutory provision) (emphasis added). That reflects the breadth of the federal authority to "ensure compliance with the provision" of a federal statute even when the federal agency lacked the explicit rulemaking authority that the FCC has under § 201 and the other provisions of the Communications Act. *Id.* at 516.

In all events, the FCC would have explicit authority to adopt pricing rules even if its rulemaking authority were limited to implementing the requirements of § 251. For § 251(c) requires LECs to provide "wholesale rates for resale" and to provide "network elements" and "interconnections" at "rates" that are "just, reasonable, and nondiscriminatory" and "in accordance with . . the agreement and the requirements of this section and

section 252[(d)]." In addition, § 252(c)(1) requires States to adhere to FCC regulations that implement § 251's requirements when they resolve any "open issue" in an arbitration, and § 252(a)(1) requires parties to attempt to negotiate agreements containing "a detailed schedule of itemized charges" and to arbitrate the rates if there is no agreement. Finally, because the FCC has exclusive jurisdiction over some of the costs that can be included in the rates established under § 252(c) (see, *e.g.*, §§ 251(b)(2) & (e)), Congress necessarily intended that States establish rates by following FCC regulations as well as the requirements of § 252(d).

B. The Requirements Of §§ 251 And 252 Are Within The FCC's Jurisdiction Over Interstate Services.

The Eighth Circuit's jurisdictional holdings also rested on a second ground: that the requirements of §§ 251 and 252 are intrastate matters and are outside the FCC's jurisdiction over interstate services. However, as explained in the Statement of the Case, these provisions were enacted against the background of the uniform holdings that the FCC's authority over interstate services encompasses any subject that cannot feasibly be divided into interstate and intrastate components and separately regulated by state and federal authorities.

That is the ground on which the FCC had exclusive jurisdiction over private line networks and customer premises equipment and its interconnections to local networks prior to the 1996 Act. See pp. 5-9, *supra*. That ground fully applies to the new interconnection arrangements that are required by §§ 251 and 252. They permit new entrants to acquire interconnections and network elements (*e.g.*, the same leased local loop from a private line network) and use the elements to provide not only intrastate "exchange service" but also interstate "exchange access services" and other interstate services. While the rates for the services that the new entrants offer to the

public will be separately regulated by the States (for purely intrastate services) and by the FCC (for other services), the rates, terms, and conditions for the "wholesale" capacity that new entrants acquire from LECs and use to provide competing services are determined on a jurisdictionally unseparated basis. In particular, § 252 provides that a single body (either a state commission or the FCC) will, for example, establish a single rate, and single set of terms and conditions, governing a new entrant's lease of a local loop in Arlington, Virginia.

Contrary to the Eighth Circuit's apparent belief (Pet. App. 20a), it is irrelevant that the Act establishes a separations process for circumstances in which the FCC and the States establish separate rates for the interstate and intrastate calls placed over a local loop and other facilities in LEC networks. Where a single rate is established that governs both interstate and intrastate uses of a facility, there is no occasion for separations of investment and expenses, as settled law prior to 1996 established. *See* pp. 5-8, *supra*. Accordingly, in the local competition rulemaking proceedings before the FCC, not a single commentator argued that there was any basis for separating the interconnection arrangements into interstate and intrastate components, and there is no basis for upsetting the FCC's reasonable and well-supported determination that the matters are not severable. Pet. App. 194a-195a (¶ 92).

C. The Other Terms And Structure Of The Act Confirm That The FCC Has The Authority Both To Adopt Rules Defining The Pricing And Other Requirements Of Sections 251 And 252 And To Enforce Those Rules In Other Proceedings.

Finally, the Eighth Circuit also erroneously held that it could prevent "evasion" of the States' alleged jurisdiction over pricing and other matters by construing §§ 10, 208, 271 or other terms of the Act to deny the FCC authority to determine the legal

sufficiency of LEC prices and other conduct. The reality is that all the Act's other terms and structure independently establish that the Eighth Circuit's jurisdictional holding is wrong. They confirm that Congress intended that the FCC would adopt pricing and other rules to implement all the requirements of §§ 251 and 252 and that these rules would first be applied by States (or the FCC) in arbitrating interconnection arrangements and then would be applied in the §§ 10, 208, 271, and other proceedings that are within the FCC's exclusive jurisdiction.

First, the other provisions of the Act establish both that no legitimate state interest is served by requiring state commissions to follow the FCC rules governing only some of §§ 251 and 252's requirements and that the Eighth Circuit's jurisdictional holding is antithetical to the other terms and structure of the Act. Foremost, rather than incorporate provisions of state law on which state commissions would be entitled to deference, the Act explicitly adopts minimum federal standards to govern pricing and all other terms of interconnection arrangements and makes each state arbitration decision reviewable in federal district courts who cannot defer to a State's legal determinations. In this regard, even under the Eighth Circuit's holding, any state commission that fails to follow the interpretation of the federal requirements that best effectuates their terms and purposes will be reversed by a federal district court, a court of appeals, or this Court. Accordingly, the other provisions of the Act establish that a State's only possible legitimate interest is to be supplied with that interpretation in advance -- through FCC rules and a single judicial review proceeding -- not through *post hoc* litigation that can require a State to redo the arbitration.

Moreover, the inevitable effect of the Eighth Circuit's jurisdictional holding will be both to delay the Act's implementation in States that fail to adopt the correct interpretation of its provisions and to impose extraordinary

burdens on the federal courts that are now reviewing States' decisions in over 60 pending cases. However, each of these consequences is inconsistent with the Act's other terms and structure. The highly compressed time deadlines that § 252 establishes for the negotiation, arbitration, and approval of interconnection agreements -- and the requirement that the FCC issue implementing rules within six months -- forecloses any notion that Congress could have intended such delays and burdens, and the increased costs to new entrants that result.

In addition, still other provisions of the Act presume that the FCC has the enforcement and rulemaking authority that the Eighth Circuit denied it. For example, § 10 of the Act (47 U.S.C. § 160) generally authorizes the FCC to "forbear" from applying any provision of the Act to any carrier or service if it finds, among other things, that enforcement of the provision is not necessary to ensure that the charges are "just and reasonable and . . . [non]discriminatory." *Id.* § 160(a). Further, § 10(d) expressly provides that "the Commission may not forbear from applying the requirements of section 251(c) . . . under subsection (a) of this section, until it determines that those requirements have been fully implemented." §160(d). Congress could not have authorized the FCC to forbear from "applying" the requirements of § 251(c) unless the FCC had the authority to interpret and enforce § 251(c)'s pricing and other standards in the first place. The Eighth Circuit's attempt to argue otherwise ignores the text of § 10. See Pet. App. 86a-87a.

Moreover, other provisions of the Act expressly authorize the FCC to make the same determinations that the Eighth Circuit has held to be outside the FCC's jurisdiction, and the Eighth Circuit has responded to each by contorting the statutory language to limit the FCC's authority in order to prevent "evasion" of state jurisdiction. For example, § 208 expressly allows any party to file a complaint with the FCC that claims that a common carrier has violated any requirement of the Act,

including both the duty to provide the access arrangements required by § 251(c) and the duty to comply with any approved interconnection agreement under § 251(c)(2) & (3).

Because it feared that § 208 could allow the FCC directly to review the lawfulness of the LECs' charges and to enforce a state-approved interconnection agreement, the Eighth Circuit essentially rewrote the statute to protect the States' alleged exclusive jurisdiction. The Eighth Circuit "interpreted" the § 252(e)(6) remedy that entrants have against States as precluding § 208 and other enforcement actions against LECs. Further, the Eighth Circuit not only "construed" § 252 to give the States and the federal district courts the jurisdiction over the enforcement of interconnection agreements that the Act does not confer, but also held that this jurisdiction is exclusive. Finally, it also held that § 208 complaints can be filed only for claimed violations of requirements involving interstate services. Pet. App. 30a-34a. Each holding is contrary to the Act's text.

Similarly, § 271 of the Act provides that the FCC cannot authorize a BOC to provide long distance services to customers in a State unless the FCC "finds" that the BOC is, among other things, providing "access to network elements in accordance with the requirements of sections 251(c) and 252(d)(1)" (§ 271(c)(2)(B)(ii)) -- which is the same standard a federal district court must apply when it directly reviews a State's pricing determinations. § 252(e)(6). As the D.C. Circuit has held, § 271 provides that the FCC must conclude "to its own satisfaction" that the BOC has satisfied all "statutory requirements" for long-distance authority, and the FCC is not required "to give the State commissions' views any particular weight" in making that determination. *SBC Communications, Inc.* v. *FCC*, No. 97-1425, slip op. at 12-13 (D.C. Cir. March 20, 1998) (Silberman, J.). Although federal authorities had to assess the sufficiency of state approved arrangements under the MFJ in precisely these ways, the Eighth Circuit has (in a

subsequent order that is the subject of a separate petition for certiorari) required the FCC here to defer to state pricing determinations in order to assure that the "effect" of its § 271 jurisdiction is not to cause any State to follow the FCC's view of how the federal pricing requirements should be interpreted and implemented. *Supra*, pp. 8-9, 17.

Finally, while not discussed by the Eighth Circuit, § 253(d) authorizes the FCC to preempt any state order that "may" have the "effect" of prohibiting any entity from providing "any interstate or intrastate telecommunications service." By its terms, this provision gives the FCC authority over any state-authorized aspect of an interconnection arrangement. Indeed, while the FCC did not expressly invoke § 253 when it adopted its pricing rules, the FCC then found that the different pricing rules that some states have now adopted constitute such entry barriers. J.A. 147-162 (¶¶ 704-723).

In short, the other provisions of the Act vividly confirm what §§ 151, 154, 201, 251(d), and 303 make explicit. Congress intended that the FCC would adopt regulations defining all the requirements of §§ 251 and 252. Congress further intended that these regulations would be first applied by the States (or the FCC) in conducting arbitrations and then applied by the FCC in conducting proceedings under §§ 208, 253, 271, and other provisions of the Act.

D. Because Of Its Erroneous Jurisdictional Holding, The Eighth Circuit Applied The Wrong Standard in Reviewing Other Rules.

The Eighth Circuit's jurisdictional holding also caused it to apply an incorrect legal standard in reviewing those FCC rules that the Eighth Circuit found were within the FCC's jurisdiction. In particular, as this Court has repeatedly held, §§ 151, 154, 201, 251(d), and 303 authorize the FCC to adopt any rules that

are not inconsistent with the requirements of the Act and that reasonably implement its objectives. See pp. 23-24 & nn. 13-14, *supra*. But the Eighth Circuit did not apply this standard in reviewing the FCC's other rules, for the Eighth Circuit erroneously held that these statutory provisions were all inapplicable. Instead, the Eighth Circuit erroneously invalidated three separate sets of FCC rules on the ground that they did not rest on interpretations of the terms of the six subsections of § 251 that mention the FCC.

First, the Eighth Circuit vacated 47 C.F.R. § 51.317 which governs determinations of whether additional network elements must be made available by establishing a rebuttable presumption that if "it is technically feasible to unbundle a particular element," then "the element must be unbundled." Pet. App. 46. No claim was made that this rule frustrated the purposes of the Act or was inconsistent with any of its provisions. Instead, the Eighth Circuit vacated the rule (Pet. App. 46a) simply because there is "no reference to technical feasibility" in § 251(d)(2), which establishes some factors that the FCC must "at a minimum" consider "[i]n determining what network elements should be made available." That was plain error. The absence of any reference to technical feasibility in § 251(d)(2) does not prohibit the FCC from taking issues of technical feasibility into account in identifying network elements. Indeed, the Eighth Circuit's holding would produce the absurdity that the Act could permit or require the unbundling of a particular network capability even when that is technically infeasible.

Second, the Eighth Circuit vacated FCC rules that required incumbents to provide requesting carriers, for an additional charge, with "superior quality interconnection" or "access." Pet. App. 50a-52a (vacating Rules 51.305(a)(4) and 51.311(c)). The Eighth Circuit vacated these rules because the statute stated that access and interconnection must be "at least equal in quality" and could not be construed to *require* superior access.

Pet. App. 100a. Again, no claim was made that the rules were inconsistent with the Act's terms or purposes.

Third, the Eighth Circuit vacated Rules 51.315(c)-(f), which required LECs, upon request and again for additional compensation, to combine network elements with elements possessed by the new entrant or to combine their own network elements in a manner in which they are "not ordinarily combined" in the LECs' network. See Pet. App. 294a. The Eighth Circuit concluded that these rules were not authorized by the second sentence of § 251(c)(3) -- which requires LECs to provide network elements "in a manner that allows requesting carriers to combine" them -- because that sentence "indicates" that the new entrants "will combine the [] elements themselves." See Pet. App. 53a. But here, too, no claim was made that it was inconsistent with the Act's terms or purposes for the FCC to require LECs -- with their superior knowledge of and access to their networks -- to assume that task when requested and fully compensated.

In short, because of the Eighth Circuit's erroneous jurisdictional holding, it vacated pricing and certain non-pricing rules on the ground that they were outside the FCC's jurisdiction and vacated three sets of other rules by applying an incorrect legal standard. These aspects of the Eighth Circuit's judgment should be reversed, and the Eighth Circuit directed to review all these rules under the correct standard.

II. RULE 51.315(b) IMPLEMENTS § 251(c)(3)'s NONDISCRIMINATION REQUIREMENT AND IS CONSISTENT WITH THE UNIFORM DICTIONARY, JUDICIAL, AND REGULATORY DEFINITIONS OF "UNBUNDLED."

FCC Rule 51.315(b) provides that "[e]xcept upon request, an incumbent LEC shall not separate requested network elements

that the incumbent LEC currently combines." 47 C.F.R. § 51.315(b). That rule implements the requirement of § 251(c)(3) that new entrants receive "*nondiscriminatory* access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and *nondiscriminatory*" (emphasis added). As the FCC has held, and as no party has challenged, "nondiscrimination" requires that LECs provide to new entrants the same quality of access to their facilities that the LECs receive themselves. *See* 47 C.F.R. § 51.313(b). Rule 51.315(b) implements that requirement by providing that an incumbent LEC must enable the new entrant to access network elements in combined form to serve a customer when (but only when) the LEC would access those elements in combined form if it were establishing the customer's service. Correlatively, it provides that, absent a request for greater separation, the LEC may separate elements provided to new entrants only to the extent that the elements are separated when the LEC accesses them to establish a customer's service.

This straightforward application of the nondiscrimination requirement is necessary to prevent conduct that would otherwise devastate the ability of new entrants to use network elements to compete with the LECs. Each of the seven network elements the FCC requires LECs to make available is always at least physically connected to, and accessed by the LEC in combination with, one or more of the other six elements. For example, the "loop," the wires that connect the customer's premises to the network, is connected at both ends to other network elements -- at one end to the switch, and at the other end to the "network interface device," a small box at the customer's home or business. If a LEC were permitted physically to disconnect these and other elements from each other before providing them to new entrants, it could render competition through network elements completely infeasible.

That is so for at least three reasons. First, a new entrant that signed up a new customer would incur the cost and delay of somehow obtaining access to the LEC's network and physically reconnecting the elements before it could actually provide service. This would be a powerful entry barrier that would destroy the economics of using network elements to provide competitive service, for, as the FCC found, the new entrant would then bear costs to provide service "that incumbent LECs would not incur" to provide the same service.[15] Second, such disassembly would create a powerful disincentive for any customer to switch service to the new entrant, for any that did so would suffer service outages of indefinite duration as the new entrant sought to reestablish up to six separate physical connections between the elements. Third, the costs and delay would also mean that a competitive carrier would be able as a logistical matter to fill orders from only a competitively trivial number of customers in a given year, thus foreclosing any prospect of widespread competition through network elements.[16] In each respect, the fundamental problem is the same: the new entrant would be forced to provide service at degraded quality and at higher cost than the LEC, and would therefore be denied the nondiscriminatory access that is essential to competition and required by § 251(c)(3).

That has been the precise result of the Eighth Circuit's

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[15] *Local Competition*, Third Order on Reconsideration, 12 F.C.C.R. 12460, 12486, ¶ 44 (1997) (*pet. for rev. on other grounds pending*, No. 97-3389 (8th Cir.)) (J.A. 247-48).

[16] By contrast, when customers switch their long-distance service from one carrier to another, no such disconnection and reconnection of facilities is undertaken. The switchover is therefore quick and seamless, and customers switched long-distance carriers 53 million times in 1996. No such competitive outcome would be possible in local markets if LECs could require discriminatory physical recombinations of elements every time a customer attempted to switch away from the incumbent.

decision invalidating Rule 51.315(b). In the wake of that decision, the LECs announced that they would thereafter physically disconnect certain network element combinations before providing them to new entrants even when the LECs access those elements themselves in combined form. The LECs did so because combinations of network elements constitute the only entry vehicle that can permit the immediate, nationwide establishment of alternatives to the LECs' exchange and exchange access services, and they are particularly critical for providing competition for residential service.[17] Investment analysts have thus concluded that the Eighth Circuit's decision on rehearing "effectively has killed off local competition" in much of the local market.[18]

The Eighth Circuit's rehearing decision invalidated Rule 51.315(b) on three related grounds. First, it held that the term "unbundled" in § 251(c)(3)'s first sentence means "separated" or "uncombined." Pet. App. 71a. Second, the Eighth Circuit seemingly also relied on its previous holding that § 251(c)(3)'s second sentence -- "[a]n incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine" them -- "indicates that requesting carriers will combine the unbundled elements themselves." Pet. App. 53a. It concluded that this sentence must also authorize the incumbent LEC to separate network elements before providing the requesting carrier with access to them so that the requesting carrier can then "rebundle" them. *Id.* Finally, the Eighth Circuit stated that the FCC's rule would

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[17] *See, e.g.*, Aff. of Joseph Gillan on Behalf of the Competitive Telecommunications Association, Ex. 1, *Petition of New York Tel for Approval of Statement of Generally Available Terms and Conditions*, 97-C-0271 (NY PSC) (90% of orders for unbundled network element combinations are to serve residential as opposed to business customers).

[18] *Court Ruling May Close Door on Leasing of Network Elements by CLECs*, Communications Today (Oct. 16, 1997).

destroy the Act's "careful distinctions" between unbundled network elements and resale. Pet. App. 71a.

Each holding is erroneous. Indeed, the FCC's interpretation of § 251(c)(3) is the only plausible construction of that section's terms. In any event, it is patently a permissible and reasonable interpretation to which the Eighth Circuit was required to defer. See, e.g., *Chevron USA, Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

A. "Unbundled" Does Not Mean "Disconnected."

The Eighth Circuit defined the term "unbundled," which appears in § 251(c)(3)'s first sentence, as the opposite of "combined," which appears in its second sentence. See Pet. App. 71a. The term "combine" in the second sentence means to "connect[]" two or more network elements so that they can be used to provide service. See *First Report*, Pet. App. 232a (¶ 294 n.620). Accordingly, the Eighth Circuit's holding was that LECs may "unbundle" network elements by disconnecting them.

1. That interpretation flies in the face of the plain statutory language, which clearly contemplates that new entrants will often obtain access to network elements in combinations. Section 251(c)(3) provides that LECs must provide access to "network *elements*" (in the plural) at any "technically feasible *point*" (in the singular). The only way a new entrant can access multiple elements at a single point is if those elements are provided in combination.

2. The Eighth Circuit's interpretation of "unbundled" is also foreclosed by the uniform dictionary, regulatory, and judicial definitions of the term -- none of which the Eighth Circuit even acknowledged. To provide something on an unbundled basis is not to disconnect it, but simply to state a separate price for it and to give users the option of declining to purchase it as part

of a package.

First, that is the dictionary definition. "Unbundle" is uniformly defined by dictionaries as "to separate the charges for related products or services usually offered as a package," with telephone service listed as an example.[19] That multiple dictionaries support the FCC's interpretation is itself conclusive of its reasonableness. See *National R.R. Passenger Corp.* v. *Boston & Me. Corp.*, 503 U.S. 407, 418-19 (1992).

Second, that was the meaning of the term "unbundled" in the 15 years of prior regulatory decisions that had directed LECs to provide other components of telephone service on an unbundled basis. In these decisions, the LECs' duty was to state a separate price for these components and to give customers the option of declining to obtain the unbundled component in combination with other LEC facilities or services. For example, in 1980, the LECs were required to "unbundle" telephone sets from the provision of local telephone service. That meant that LECs were required to price the two separately and give customers the option of replacing LEC telephones with those obtained from other sources. It did not mean that LECs visited the homes of customers who chose to continue leasing LEC telephones, disconnected them, and made the customers incur inconvenience and expense to reconnect them. See p. 8, *supra*.

The same rule applied when the FCC ordered the "unbundling"

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[19] *Random House Dictionary Of The English Language* at 2055 (2d Ed. Unab. 1987); *accord, Webster's New Collegiate Dictionary* (Merriam, 1981), at 1263 ("unbundle" is "to give separate *prices* for equipment and supporting services; to *price* separately") (emphases added); *American Heritage Dictionary*, at 1315 (2d Col. Ed. 1991) ("unbundling" is "[t]he separate pricing of goods and services").

of inside wire,[20] of features used to provide enhanced services,[21] and of dedicated transport, switched transport, and tandem switching.[22] And that is also how courts have uniformly used the term in other industries.[23] In all these contexts, to unbundle is to provide separate rates and choices for users, not to create inefficiencies for purchasers who order existing combinations.[24] Indeed, this Court has held that it violates the Sherman Act if a firm with market power acts with no "normal business purpose" and no "efficiency justification" to harm consumers and competitors. See *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605-611 (1985).

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[20] *Inside Wiring*, 59 Rad. Reg.2d 1143, 1151-56 (1986), *aff'd in relevant part*, *NARUC* v. *FCC*, 880 F.2d 422 (D.C. Cir. 1989).

[21] *Third Computer Inquiry*, 104 F.C.C.2d 958, 1064-66 (1986) ("unbundling" means that "competitors will pay only for Basic Service Elements that they use").

[22] *Expanded Interconnection*, 7 F.C.C.R. 7369 (1992) (dedicated transport); 8 F.C.C.R. 7374 (1993) (switched transport and tandem switching).

[23] *See, e.g.*, *Northwest Pipeline Co.* v. *FERC*, 61 F.3d 1479, 1482 (10th Cir. 1995) (distinguishing "'bundled customers,' who are charged a unitary rate," and "'unbundled customers,'. . . who are charged separately for each component of service"); *Stinnett* v. *BellSouth*, 1993 U.S. Dist. LEXIS 21056, *6 (E.D. Tenn. March 3, 1993) ("unbundling". . . means that "charges [are] listed separately on a customer's bill"); *In re Data General Corp. Antitrust Lit.*, 490 F. Supp. 1089, 1105 (N.D. Cal. 1980) ("companies that market both software and CPUs make their software available on an 'unbundled' basis -- i.e., without also requiring the purchase of their own CPUs").

[24] Further, if Congress had regarded "unbundled" as the antonym of "combined," it presumably would have written the two sentences of § 251(c)(3) in parallel fashion -- either by requiring LECs to offer access to "*uncombined* network elements" or by requiring LECs to make unbundled network elements available "in a manner that enables requesting carriers to *bundle* them." Instead, Congress used different words because it was addressing different concepts.

Third, that was thus also the meaning of "unbundled" in the equal access requirements of the MFJ and GTE antitrust consent decrees that § 251(g) of the Act requires the FCC to enforce until it adopts "supersed[ing]" "regulations" under § 251. These provisions required the BOCs and GTE to provide all exchange access on an "unbundled . . . basis" at cost-based rates, which requires not that they pull apart network elements but that they file an "unbundled schedule [] of charges" and give carriers the option of using some elements but not others. See *United States* v. *AT&T*, 552 F. Supp. at 233; *United States* v. *GTE*, 603 F. Supp. at 743-46.

Indeed, this definition of "unbundled" is so widely understood that LECs themselves had urged its adoption at the FCC. In particular, in the Notice of Proposed Rulemaking that initiated this proceeding, the FCC provisionally defined "unbundling" as stating separate charges and providing the "ability" to obtain the component separately,[25] and the trade association of incumbent LECs endorsed this definition.[26] The FCC then incorporated that definition in a rule (§ 51.307(d)) and also adopted other rules reflecting the same understanding of unbundling.[27] These aspects of those other rules were not challenged before the Eighth Circuit. Indeed, it was only after the Eighth Circuit's first opinion revealed that the court had erroneously assumed that "unbundled" was the opposite of "combined" (Pet. App. 56a-57a) that the LECs seized on that notion, sought rehearing

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[25] *Local Competition*, 11 F.C.C.R. 14171, 14200 ¶ 86 & n. 116 (1996) (quoting *Random House College Dictionary*, at 1428 (revised ed. 1980)).

[26] *See* Comments of United States Telephone Association, at 26 (May 16, 1996).

[27] For example, the FCC also adopted 47 C.F.R. 51.307(b) to make it explicit that new entrants can never be "prohibited from requesting two network elements that are connected to each other." *First Report*, ¶ 329 (Pet. App. 243a); *accord* §§ 51.319(e)(1); 51.319(e)(2)(iii) (Pet. App. 298-301).

to invalidate Rule 51.315(b), and converted the error into a holding.

3. Finally, the Eighth Circuit's definition is also at odds with other aspects of its own decision. For example, as the Eighth Circuit correctly noted, the Act "definitively declares" that signaling systems are network elements. Pet. App. 44a (citing 47 U.S.C. § 3(29)); see also 47 C.F.R. § 51.319(e). But signaling systems, like most network elements, are "shared" facilities. This means that new entrants and the incumbent LECs both use the same signaling facilities at the same time for all their customers, much as multiple employees in a single company often access and share the same central office computer. That further means that any act to disconnect those facilities from other network elements risks causing outages for all local exchange customers, both the LECs' customers and new entrants' customers.[28]

The engineering realities of telecommunications networks are thus wholly at odds with the Eighth Circuit's understanding of unbundling. Telecommunications networks consist of highly interdependent facilities and functionalities. As one FCC Commissioner explained, network elements cannot simply be "unplugged" from one another and then put "back together [by the new entrant] like pieces in a Lego play set."[29] The Eighth

[28] The LECs have therefore confined their separating to those elements that are not shared facilities, like the loop, so that they will impose outages only on the new entrants' customers.

[29] *See BellSouth Corp.*, 13 F.C.C.R. 539 (1997) (separate statement of Commissioner Powell). Indeed, this reality led that Commissioner to recommend complying with the Eighth Circuit's decision by having new entrants pay a "glue charge" to LECs in exchange for the LECs' merely leaving their network element combinations intact and thus "*simulat[ing]* the fiction of unbundling and rebundling." *Id.* (emphasis added). The suggestion that the only practical way to deal with the Eighth Circuit's decision is to require new (continued...)

Circuit's erroneous interpretation of "unbundled" simply underscores the importance of respecting the "practical agency expertise [that] is one of the principal justifications behind *Chevron* deference." *Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 651-52 (1990).

B. The Statutory Requirement That Incumbent LECs "Allow" New Entrants To Combine Elements Does Not Authorize LECs To Disconnect Elements.

The Eighth Circuit also adopted a related misconstruction of the second sentence of § 251(c)(3). That sentence provides: "An incumbent local exchange carrier shall provide such unbundled network elements in a manner that allows requesting carriers to combine such elements in order to provide such telecommunications service." In its initial decision, the Eighth Circuit had held that this sentence "could not be read to levy a duty on the incumbent LECs to do the actual combining of elements," but rather "indicates that requesting carriers will combine the unbundled elements themselves." Pet. App. 53a; *id.* ("the Act does not require incumbent LECs to do *all* of the work"). On that basis, the Eighth Circuit had invalidated Rules 51.315(c)-(f), which had required LECs, upon request by a new entrant and for compensation, to combine network elements that were *not* already combined -- *e.g.*, to combine LEC network elements with the new entrant's facilities, or to combine LEC network elements with other LEC network elements in ways in which they are not "ordinarily combined in the incumbent LEC's network." Pet. App. 53a, 294a.

On rehearing, the Eighth Circuit extended that holding by also

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[29] (...continued)
entrants to pay protection money for a completely non-existent "rebundling" service underscores how far the Eighth Circuit's holding departed from any rational understanding of the Act.

invalidating Rule 51.315(b), even though it, in contrast to Rules 51.315(c)-(f), did not remotely "levy a duty" on LECs "to do the actual combining of elements." To the contrary, Rule 51.315(b) applied only to elements that are already combined, so LECs did not have to do any "work" to comply with it, but merely to refrain from affirmative acts of sabotage.

However, by vacating Rule 51.315(b), the Eighth Circuit effectively read the second sentence's command that LECs "allow" new entrants to combine elements as (a) applying to elements that were already combined, and (b) providing that new entrants would not only be "allow[ed]", but also that they could be required, to establish connections between all elements they purchase. It therefore held that LECs could disconnect elements before providing them to new entrants even when the LECs access those elements for themselves in combined form.

The Eighth Circuit fundamentally misread the Act. The second sentence of § 251(c)(3) imposes a requirement not on new entrants, but on LECs, and that requirement is in addition to the LECs' duties under the first sentence. Thus, the first sentence requires, *inter alia*, that LECs provide nondiscriminatory access to network elements (*i.e.*, in the same form as the LECs access them), and that such access be provided at "any technically feasible point." In addition, even after they comply with those obligations, the LECs still have the duty under the second sentence to provide access at that "technically feasible point" in a manner that allows new entrants to combine the elements.

This obligation of the second sentence is part of the statutory scheme because LECs may lawfully separate elements in at least two circumstances. First, Rule 51.315(b) permits LECs to separate elements for new entrants "upon request." Thus, for example, a new entrant may seek to use a facility of its own (such as a switch) in combination with a LEC's facilities, and

will then exercise its statutory right to obtai.. access "at any technically feasible point" by interconnecting its switch with the LEC's loop. In order for the new entrant to establish that interconnection, the LEC must first physically separate the LEC's loop from the LEC's switch. Similar physical separation can be necessary when other facilities are substituted by the new entrant for the LEC's facilities. The second sentence requires that, in such situations, the LECs provide their network elements in a manner that enables the new entrant to accomplish the combining. Indeed, the LECs argued, and the Eighth Circuit held, that the second sentence of § 251(c)(3) directly addresses this situation among others. Pet. App. 52a-53a.

Second, the obligation imposed by the second sentence is also important because, even when the new entrant has not requested separation, the first sentence of § 251(c)(3) permits the LECs to provide elements to new entrants in separated form to whatever extent the LECs separate those network elements when they access the elements. When they do so, § 251(c)(3) again requires that the LECs provide new entrants with access "at any technically feasible point" and "in a manner that allows" the new entrants to "combine" the elements.

In that regard, while LECs do not physically disconnect network elements when they access those elements themselves, they do sometimes disconnect elements "logically" through their "operations support systems" ("OSS"). OSS are the computer systems that the LECs use, among other purposes, to send software instructions through the network directing how their facilities are to be used to provide service, and those systems constitute one "technically feasible point" at which new entrants can access network elements. When LECs disconnect network elements in the course of their own use, they do so logically by making software changes through their OSS, rather than by

physically pulling the pieces of equipment apart.[30] The FCC held that § 251(c)(3)'s nondiscrimination requirement applies to both "physical and logical connections" to adjacent elements (*First Report*, ¶ 312 (J.A. 56-57)), and to the extent that the LECs logically separate network elements for themselves, the LECs may likewise logically separate those elements for new entrants. However, under the second sentence of § 251(c)(3) the LECs must also then enable the new entrant to access the OSS to recombine those elements in the same way LECs do.

By contrast, if the Eighth Circuit read the second sentence to mandate disconnection in all instances, that construction is insupportable in at least three respects. First, as with the Eighth Circuit's related interpretation of "unbundled," it interprets one portion of § 251(c)(3) to authorize the discrimination that § 251(c)(3) elsewhere prohibits. Second, it ignores that the second sentence is framed exclusively as a duty of incumbent LECs to "allow" new entrants to combine elements, rather than a grant to LECs of a right to force new entrants to do such combining. Third, the Eighth Circuit's construction defeats the procompetitive purposes of the Act, for it authorizes incumbent LECs to separate elements solely to raise their rivals' costs.

C. The Eighth Circuit's Assertion That Rule 51.315(b) Should Be Invalidated To "Preserve" Resale As An "Attractive" Entry Vehicle Is Baseless.

Finally, the Eighth Circuit also justified its definition of

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[30] For example, when a LEC customer moves out of his or her home and terminates his or her local phone service, the LEC does not physically pull that customer's loop off the switch. Instead, it uses its OSS to send a message to a database associated with the former customer's switch instructing it to terminate service for that loop. Although the loop and the switch remain physically connected, they are then logically disconnected and that loop-switch combination will be inoperable, and the customer unable to make or receive phone calls, unless and until a different software instruction is sent.

"unbundled" by asserting that the FCC's contrary definition would "obliterate" the Act's "careful distinctions" between unbundled network elements and resale. Pet. App. 71a. The Eighth Circuit appeared to believe that unless it substantially and artificially increased the costs of obtaining unbundled network element combinations by permitting LECs to separate them, "all requesting carriers [would] select unbundled access over resale as their preferred route to enter the local telecommunications market," and that construing "unbundled" as "uncombined" was therefore necessary to "preserve resale" as an "attractive option." Pet. App. 56a-57a. This analysis was fundamentally misguided, both legally and factually.

First, there was no legal basis for the Eighth Circuit's effort to ensure that resale remained comparatively attractive to new entrants by making unbundled elements difficult to use. As the FCC found, Congress' purpose in establishing three different entry vehicles was to create alternative paths that new entrants with different business plans could employ "as market conditions and access to capital permit." Pet. App. 137a-138a (¶ 12). Congress could not at that time know, and did not presume to know, which entry vehicles would ultimately prove most successful or be used most often, and certainly did not instruct courts to create artificial obstacles to one vehicle in order to enhance the appeal of another.

Second and in any event, even if the issue were relevant there was never any prospect that Rule 51.315(b) would lead all new entrants to purchase network elements and that the resale option would thereby be nullified. The FCC made detailed findings on this very point in the same order in which it adopted Rule 51.315(b). It explained that these entry vehicles present different costs, different risks, and different opportunities; that new entrants select one or the other based on a range of factors, including the markets they seek to enter, the particular services they seek to provide, and their willingness to assume risk; and

that there is no prospect that the availability of network element combinations will mean that no carrier engages in resale. Pet. App. 244a-246a. These findings were eminently reasonable, supported by a voluminous record, and well within the FCC's expertise, and the Eighth Circuit had no legitimate basis for concluding that it needed to impose additional burdens on purchasers of network elements to make resale more attractive.

Finally, even if Congress had thought it important to ensure that resale be a comparatively attractive entry option and the FCC's factual findings had been found erroneous, the most the Eighth Circuit could have concluded was that §§ 251(c)(3) and 251(c)(4) embodied partially conflicting policies. However, the "principle of deference to administrative interpretations" is highest "'whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies.'" *Chevron*, 467 U.S. at 844 (citation omitted). In short, the Eighth Circuit fundamentally misperceived its role as a reviewing court when it invalidated Rule 51.315(b). It improperly rested its decision on an unprecedented definition of an established term and on uninformed and inaccurate economic and factual speculations that are contrary to well-reasoned conclusions of the federal agency responsible for the Act's implementation.

III. THE FCC's CONSTRUCTION OF § 252(i) IS CORRECT, AND IN ALL EVENTS REASONABLE UNDER *CHEVRON*.

Section 252(i) requires an incumbent LEC to "make available *any* interconnection, service or network element provided *under* an agreement . . . to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement." 47 U.S.C. § 252(i) (emphasis added). The FCC interpreted this "most favored nation" provision in light of its language and evident purpose, and concluded that it required incumbents to make available

"any individual interconnection, service, or network element arrangement contained in an agreement" under all of the "terms and conditions [that] legitimately relate[] to the purchase of the individual element being sought." Pet. App. 261a, 264a, 336a.

The Eighth Circuit vacated this rule, holding that § 252(i) requires incumbents to make available only agreements in their totality, rather than individual elements provided under an agreement. Pet. App. 27a. That holding conflicts with § 252(i)'s language, history and purposes and is based on a misapprehension of the rule's operation.

The FCC correctly concluded that § 252's terms draw a clear "distinction between 'any interconnection, service, or network elements provided under an agreement,' which the statute lists individually, and agreements in their totality." Pet. App. 261a-262a. Section 252(i) was thus designed to "prevent discrimination . . . by making available to other carriers *the individual elements* of agreements that have been previously negotiated." S. Rep. No. 104-23, at 22 (1995) (emphasis added).

Indeed, the terms of the FCC's rule are virtually identical to the language of § 252(i). The Eighth Circuit thus agreed that § 252(i)'s terms "could indicate that the FCC's approach was intended by Congress." Pet. App. 25a n.22. Under *Chevron*, that should have ended the matter. However, the Eighth Circuit vacated the rule because it believed that the Act "reveal[ed]" a "preference" for negotiation over arbitration and that the FCC's rule would "thwart the negotiation process" by permitting requesting carriers to "receive [a] concession without having to grant . . . the corresponding benefit." Pet. App. 26.

But these conclusions were baseless. First, the Act does not embody any overriding preference for negotiations. It establishes a short, four-month period in which LECs and their

potential competitors can attempt to negotiate agreements, and then provides for binding agency arbitrations whenever those negotiations fail to reach agreement. See § 252(b).

Second, in any event, the FCC's rule would not thwart any legitimate "give-and-take process" of negotiation. Pet. App. 26a. Under that rule, a requesting carrier must purchase a service or element under *all* the terms of the agreement that "legitimately relate" to that service or element. Thus, for example, where there has been legitimate give and take with the first carrier -- such as where an incumbent makes the terms of one element expressly conditional on the requesting carrier's agreement to purchase a defined amount of another element at that element's terms -- then a subsequent carrier would have to accept both the "benefit" as well as the "concession."

By contrast, the Eighth Circuit's reading of § 252(i) would require the subsequent carrier to take not only the terms that are tied to an individual service or element, but the entire agreement. That holding would thus permit an incumbent LEC to discriminate among new entrants, and to prevent any carrier from invoking its § 252(i) rights, merely by "insert[ing] into its agreement onerous terms for a service or element that the original carrier does not need," and therefore would not actually purchase, "in order to discourage subsequent carriers [that do need that service or element] from making a request under that agreement." Pet. App. 262a.

CONCLUSION

For the reasons stated, the Eighth Circuit's decisions should be reversed insofar as they vacate FCC rules.

Respectfully submitted,

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APPENDIX

RELEVANT STATUTORY PROVISION

47 U.S.C. § 271

§ 271. Bell operating company entry into interLATA services

(a) General limitation

Neither a Bell operating company, nor any affiliate of a Bell operating company, may provide interLATA services except as provided in this section.

(b) InterLATA services to which this section applies

(1) In-region services

Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating in any of its in-region States (as defined in subsection (i) of this section) if the Commission approves the application of such company for such State under subsection (d)(3) of this section.

(2) Out-of-region services

A Bell operating company, or any affiliate of that Bell operating company, may provide interLATA services originating outside its in-region States after February 8, 1996, subject to subsection (j) of this section.

(3) Incidental interLATA services

A Bell operating company, or any affiliate of a Bell operating company, may provide incidental interLATA services (as defined in subsection (g) of this section) originating in any State after February 8, 1996.

(4) Termination

Nothing in this section prohibits a Bell operating company or any of its affiliates from providing termination for interLATA services, subject to subsection (j) of this section.

(c) Requirements for providing certain in-region interLATA services

(1) Agreement or statement

A Bell operating company meets the requirements of this paragraph if it meets the requirements of subparagraph (A) or subparagraph (B) of this paragraph for each State for which the authorization is sought.

(A) Presence of a facilities-based competitor

A Bell operating company meets the requirements of this subparagraph if it has entered into one or more binding agreements that have been approved under section 252 of this title specifying the terms and conditions under which the Bell operating company is providing access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service (as defined in section 153(47)(A) of this title, but excluding exchange access) to residential and business subscribers. For the purpose of this subparagraph, such telephone exchange service may be offered by such competing

providers either exclusively over their own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier. For the purpose of this subparagraph, services provided pursuant to subpart K of part 22 of the Commission's regulations (47 C.F.R. 22.901 et seq.) shall not be considered to be telephone exchange services.

(B) Failure to request access

A Bell operating company meets the requirements of this subparagraph if, after 10 months after February 8, 1996, no such provider has requested the access and interconnection described in subparagraph (A) before the date which is 3 months before the date the company makes its application under subsection (d)(1) of this section, and a statement of the terms and conditions that the company generally offers to provide such access and interconnection has been approved or permitted to take effect by the State commission under section 252(f) of this title. For purposes of this subparagraph, a Bell operating company shall be considered not to have received any request for access and interconnection if the State commission of such State certifies that the only provider or providers making such a request have (i) failed to negotiate in good faith as required by section 252 of this title, or (ii) violated the terms of an agreement approved under section 252 of this title by the provider's failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement.

(2) Specific interconnection requirements

(A) Agreement required

A Bell operating company meets the requirements of this paragraph if, within the State for which the authorization is sought–

(i)(I) such company is providing access and interconnection pursuant to one or more agreements described in paragraph (1)(A), or

(II) such company is generally offering access and interconnection pursuant to a statement described in paragraph (1)(B), and

(ii) such access and interconnection meets the requirements of subparagraph (B) of this paragraph.

(B) Competitive checklist

Access or interconnection provided or generally offered by a Bell operating company to other telecommunications carriers meets the requirements of this subparagraph if such access and interconnection includes each of the following:

(i) Interconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1) of this title.

(ii) Nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1) of this title.

(iii) Nondiscriminatory access to the poles, ducts, condu-

its, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of section 224 of this title.

(iv) Local loop transmission from the central office to the customer's premises, unbundled from local switching or other services.

(v) Local transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services.

(vi) Local switching unbundled from transport, local loop transmission, or other services.

(vii) Nondiscriminatory access to--

(I) 911 and E911 services;

(II) directory assistance services to allow the other carrier's customers to obtain telephone numbers; and

(III) operator call completion services.

(viii) White pages directory listings for customers of the other carrier's telephone exchange service.

(ix) Until the date by which telecommunications numbering administration guidelines, plan, or rules are established, nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone exchange service customers. After that date, compliance with such guidelines, plan, or rules.

(x) Nondiscriminatory access to databases and associated signaling necessary for call routing and completion.

(xi) Until the date by which the Commission issues regulations pursuant to section 251 of this title to require number portability, interim telecommunications number portability through remote call forwarding, direct inward dialing trunks, or other comparable arrangements, with as little impairment of functioning, quality, reliability, and convenience as possible. After that date, full compliance with such regulations.

(xii) Nondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3) of this title.

(xiii) Reciprocal compensation arrangements in accordance with the requirements of section 252(d)(2) of this title.

(xiv) Telecommunications services are available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3) of this title.

(d) Administrative provisions

(1) Application to Commission

On and after February 8, 1996, a Bell operating company or its affiliate may apply to the Commission for authorization to provide interLATA services originating in any in-region State. The application shall identify each State for which the authorization is sought.

(2) Consultation

(A) Consultation with the Attorney General

The Commission shall notify the Attorney General promptly of any application under paragraph (1). Before making any determination under this subsection, the Commission shall consult with the Attorney General, and if the Attorney General submits any comments in writing, such comments shall be included in the record of the Commission's decision. In consulting with and submitting comments to the Commission under this paragraph, the Attorney General shall provide to the Commission an evaluation of the application using any standard the Attorney General considers appropriate. The Commission shall give substantial weight to the Attorney General's evaluation, but such evaluation shall not have any preclusive effect on any Commission decision under paragraph (3).

(B) Consultation with State commissions

Before making any determination under this subsection, the Commission shall consult with the State commission of any State that is the subject of the application in order to verify the compliance of the Bell operating company with the requirements of subsection (c) of this section.

(3) Determination

Not later than 90 days after receiving an application under paragraph (1), the Commission shall issue a written determination approving or denying the authorization requested in the application for each State. The Commission shall not approve the authorization requested in an application

submitted under paragraph (1) unless it finds that—

(A) the petitioning Bell operating company has met the requirements of subsection (c)(1) of this section and—

(i) with respect to access and interconnection provided pursuant to subsection (c)(1)(A) of this section, has fully implemented the competitive checklist in subsection (c)(2)(B) of this section; or

(ii) with respect to access and interconnection generally offered pursuant to a statement under subsection (c)(1)(B) of this section, such statement offers all of the items included in the competitive checklist in subsection (c)(2)(B) of this section;

(B) the requested authorization will be carried out in accordance with the requirements of section 272 of this title; and

(C) the requested authorization is consistent with the public interest, convenience, and necessity.

The Commission shall state the basis for its approval or denial of the application.

(4) Limitation on Commission

The Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B) of this section.

(5) Publication

Not later than 10 days after issuing a determination under paragraph (3), the Commission shall publish in the Federal Register a brief description of the determination.

(6) Enforcement of conditions

(A) Commission authority

If at any time after the approval of an application under paragraph (3), the Commission determines that a Bell operating company has ceased to meet any of the conditions required for such approval, the Commission may, after notice and opportunity for a hearing—

(i) issue an order to such company to correct the deficiency;

(ii) impose a penalty on such company pursuant to title V; or

(iii) suspend or revoke such approval.

(B) Receipt and review of complaints

The Commission shall establish procedures for the review of complaints concerning failures by Bell operating companies to meet conditions required for approval under paragraph (3). Unless the parties otherwise agree, the Commission shall act on such complaint within 90 days.

(e) Limitations

(1) Joint marketing of local and long distance services

Until a Bell operating company is authorized pursuant to subsection (d) of this section to provide interLATA services in an in-region State, or until 36 months have passed since February 8, 1996, whichever is earlier, a telecommunications carrier that serves greater than 5 percent of the Nation's presubscribed access lines may not jointly market in such State telephone exchange service obtained from such company pursuant to section 251(c)(4) of this title with interLATA services offered by that telecommunications carrier.

(2) IntraLATA toll dialing parity

(A) Provision required

A Bell operating company granted authority to provide interLATA services under subsection (d) of this section shall provide intraLATA toll dialing parity throughout that State coincident with its exercise of that authority.

(B) Limitation

Except for single-LATA States and States that have issued an order by December 19, 1995, requiring a Bell operating company to implement intraLATA toll dialing parity, a State may not require a Bell operating company to implement intraLATA toll dialing parity in that State before a Bell operating company has been granted authority under this section to provide interLATA services originating in that State or before 3 years after February 8, 1996, whichever is

earlier. Nothing in this subparagraph precludes a State from issuing an order requiring intraLATA toll dialing parity in that State prior to either such date so long as such order does not take effect until after the earlier of either such dates.

(f) Exception for previously authorized activities

Neither subsection (a) of this section nor section 273 of this title shall prohibit a Bell operating company or affiliate from engaging, at any time after February 8, 1996, in any activity to the extent authorized by, and subject to the terms and conditions contained in, an order entered by the United States District Court for the District of Columbia pursuant to section VII or VIII(C) of the AT&T Consent Decree if such order was entered on or before February 8, 1996, to the extent such order is not reversed or vacated on appeal. Nothing in this subsection shall be construed to limit, or to impose terms or conditions on, an activity in which a Bell operating company is otherwise authorized to engage under any other provision of this section.

(g) Definition of incidental interLATA services

For purposes of this section, the term "incidental interLATA services" means the interLATA provision by a Bell operating company or its affiliate—

(1)(A) of audio programming, video programming, or other programming services to subscribers to such services of such company or affiliate;

(B) of the capability for interaction by such subscribers to select or respond to such audio programming, video programming, or other programming services;

(C) to distributors of audio programming or video programming that such company or affiliate owns or controls, or is licensed by the copyright owner of such programming (or by an assignee of such owner) to distribute; or

(D) of alarm monitoring services;

(2) of two-way interactive video services or Internet services over dedicated facilities to or for elementary and secondary schools as defined in section 254(h)(5) of this title;

(3) of commercial mobile services in accordance with section 332(c) of this title and with the regulations prescribed by the Commission pursuant to paragraph (8) of such section;

(4) of a service that permits a customer that is located in one LATA to retrieve stored information from, or file information for storage in, information storage facilities of such company that are located in another LATA;

(5) of signaling information used in connection with the provision of telephone exchange services or exchange access by a local exchange carrier; or

(6) of network control signaling information to, and receipt of such signaling information from, common carriers offering interLATA services at any location within the area in which such Bell operating company provides telephone exchange services or exchange access.

(h) Limitations

The provisions of subsection (g) of this section are intended to be narrowly construed. The interLATA services provided

under subparagraph (A), (B), or (C) of subsection (g)(1) of this section are limited to those interLATA transmissions incidental to the provision by a Bell operating company or its affiliate of video, audio, and other programming services that the company or its affiliate is engaged in providing to the public. The Commission shall ensure that the provision of services authorized under subsection (g) of this section by a Bell operating company or its affiliate will not adversely affect telephone exchange service ratepayers or competition in any telecommunications market.

(i) Additional definitions

As used in this section—

(1) In-region State

The term "in-region State" means a State in which a Bell operating company or any of its affiliates was authorized to provide wireline telephone exchange service pursuant to the reorganization plan approved under the AT&T Consent Decree, as in effect on the day before February 8, 1996.

(2) Audio programming services

The term "audio programming services" means programming provided by, or generally considered to be comparable to programming provided by, a radio broadcast station.

(3) Video programming services; other programming services

The terms "video programming service" and "other programming services" have the same meanings as such terms

have under section 522 of this title.

(j) Certain service applications treated as in-region service applications

For purposes of this section, a Bell operating company application to provide 800 service, private line service, or their equivalents that—

(1) terminate in an in-region State of that Bell operating company, and

(2) allow the called party to determine the interLATA carrier,

shall be considered an in-region service subject to the requirements of subsection (b)(1) of this section.